

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROGELIO ELOPRE,
Petitioner,
vs.
SUPERIOR COURT OF
CALIFORNIA, COUNTY OF
NORWALK¹, Respondent. } Case No. CV 15-09014-DMG (KES)
} ORDER TO SHOW CAUSE

On or about November 16, 2015, Petitioner constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody in the United States District

¹ The Petition improperly names the Superior Court of California, County of Norwalk as the Respondent. The Superior Court of California, County of Norwalk is not a proper party in this proceeding. The only appropriate Respondent is Petitioner's immediate custodian at his current place of confinement. Rumsfeld v. Padilla, 542 U.S. 426, 434-35 (2004); Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts and the Advisory Committee Notes thereto.

1 Court for the Eastern District of California.²

2 On November 18, 2015, an Order Transferring Case to the United States
3 District Court for the Central District of California was issued by Magistrate Judge
4 Jennifer L. Thurston. (DE # 2.)

5 The Petition is directed to a conviction sustained by Petitioner on July 6, 2011,
6 in the Los Angeles County Superior Court for two counts of lewd conduct on a child
7 under the age of 14 in violation of California Penal Code (“PC”) §§ 288 and 290.
8 Petitioner was sentenced to state prison for a term of 14 years. (DE #1 at 1.)
9 Petitioner has alleged the following grounds for relief: (1) Violation of Petitioner’s
10 Miranda³ rights; (2) Ineffective assistance of counsel; (3) Judicial abuse; and
11 (4) Sentencing errors. (Id. at 4-5.)⁴

12 1. It appears from the face of the Petition that this action is time-barred.

13 This action is subject to the Antiterrorism and Effective Death Penalty Act of
14 1996 (the “AEDPA”). Calderon v. United States District Court for the Central District
15 of California (Beeler), 128 F.3d 1283, 1287 n.3 (9th Cir. 1997), cert. denied, 522 U.S.

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19 ² The Court takes notice that Petitioner signed and verified his Federal Petition
20 on October 29, 2015. “Under the mailbox rule, a prisoner’s pro se habeas petition is
21 ‘deemed filed when he hands it over to prison authorities for mailing to the relevant
22 court.’” Campbell v. Henry, 614 F.3d 1056, 1058-59 (9th Cir. 2010) (citations
23 omitted); see also Houston v. Lack, 487 U.S. 266 (1988). A court generally deems a
24 habeas petition filed on the day it is signed, Roberts v. Marshall, 627 F.3d 768, 770
25 n.1 (9th Cir. 2010), because it assumes the petitioner turned the petition over to prison
authorities for mailing that day. Butler v. Long, 752 F.3d 1177, 1178 n.1 (9th Cir.
2014)(per curiam) (as amended).

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27 ³ Miranda v. Arizona, 384 U.S. 436 (1966).

28 ⁴ All page citations are to the electronic CM/ECF pagination.

1 1099 (1998).⁵ The AEDPA provides a one-year limitation period as follows:

2 (1) A 1-year period of limitation shall apply to an application
3 for a writ of habeas corpus by a person in custody pursuant to the
4 judgment of a State court. The limitation period shall run from
the latest of --

5 (A) the date on which the judgment became final by
conclusion of direct review or the expiration of the time for
seeking such review;

6 (B) the date on which the impediment to filing an
application created by State action in violation of the Constitution
7 or laws of the United States is removed, if the applicant was
8 prevented from filing by such State action;

9 (C) the date on which the constitutional right asserted
was initially recognized by the Supreme Court, if the right has
10 been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or

11 (D) the date on which the factual predicate of the claim
12 or claims presented could have been discovered through the
exercise of due diligence.

13 28 U.S.C. § 2244(d).

14 Here, pursuant to Porter v. Ollison, 620 F.3d 952, 954-55 (9th Cir. 2010)
15 (noting that it is proper to take judicial notice of “any state court dockets or pleadings
16 that have been located (including on the Internet)”), the Court takes judicial notice
17 from the California Appellate Courts’ website that Petitioner’s Petition for Review
18 was denied by the California Supreme Court on October 10, 2012. Thus, for purposes
19 of 28 U.S.C. § 2244(d)(1)(A), Petitioner’s judgment of conviction “became final by
20 conclusion of direct review or the expiration of the time for seeking such review” on
21 January 8, 2013, when the 90-day period for Petitioner to petition the United States
22 Supreme Court for a writ of certiorari expired. Bowen v. Roe, 188 F.3d 1157, 1158-59
23 (9th Cir. 1999); Beeler, 128 F.3d at 1286 n.2. Accordingly, the statute of limitations
24 commenced to run on January 8, 2013, unless subsections B, C or D of 28

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27 ⁵ Beeler was overruled on other grounds in Calderon v. United States District
Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc), cert. denied, 526 U.S.
28 1060 (1999).

1 U.S.C. §2244(d)(1) apply.

2 Petitioner makes no contention that he was impeded from filing his federal
 3 petition by unconstitutional state action and is thereby entitled to a later trigger date
 4 under § 2244(d)(1)(B). Shannon v. Newland, 410 F.3d 1083, 1087-88 (9th Cir. 2005)
 5 (rejecting proposition that state's determination of state law can constitute
 6 "impediment" under 28 U.S.C. §2244(d)(1)(B) as provision applies to impediments
 7 to filing a petition, not law which impacts whether a claim is meritorious), cert.
 8 denied, 546 U.S. 1171 (2006).

9 Petitioner also makes no contention that he is entitled to a later start date under
 10 § 2244(d)(1)(C) with respect to his claims. Petitioner does not rely upon any
 11 constitutional right "newly recognized by the Supreme Court and made retroactively
 12 applicable to cases on collateral review."

13 Finally, Petitioner has no basis for contending that he is entitled to a delayed
 14 start date under § 2244(d)(1)(D) based on delayed discovery. Under that subsection,
 15 the statute of limitations begins to run when the "factual predicate" of Petitioner's
 16 claims "could have been discovered through the exercise of due diligence." The term
 17 'factual predicate' refers to the facts underlying the claim, not the legal significance
 18 of those facts. Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) ("This is not
 19 to say that [Petitioner] needed to understand the legal significance of those facts -
 20 rather than simply the facts themselves - before the due diligence (and hence the
 21 limitations) clock started ticking"). Because the claims raised in the Petition concern
 22 alleged constitutional violations that occurred before and during trial and sentencing,
 23 Petitioner knew or should have known the important facts on which he bases his
 24 claims at the time he was sentenced in 2011 and upon the expiration of his direct
 25 appeal in 2012. At most, "[P]etitioner's allegations merely establish that he was
 26 unaware of the legal significance of the facts underlying his sentencing error and
 27 ineffective assistance of counsel claims ... not that [P]etitioner was unaware of the
 28 factual predicate of those claims." Perry v. Uribe, 2011 WL 6257139 *6 (C.D. Cal.

1 Nov. 10, 2011), adopted, 2011 WL 6288107 (C. D. Cal. Dec.15, 2011). The fact that
 2 Petitioner did not appreciate the legal significance of these facts does not constitute
 3 a “factual predicate” under 28 U.S.C. § 2244(d)(1)(D). Accordingly, unless a basis
 4 for tolling the statute existed, Petitioner’s last day to file his federal habeas petition
 5 was January 8, 2014. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001);
 6 Beeler, 128 F.3d at 1287-88. Petitioner constructively filed his Petition on October 29,
 7 2015; thus, the Petition was filed approximately one year and ten months after the
 8 statute of limitations expired and is facially untimely, absent statutory or equitable
 9 tolling.

10 The burden of demonstrating that the AEDPA’s one-year limitation period was
 11 sufficiently tolled, whether statutorily or equitably, rests with the petitioner. See, e.g.,
 12 Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); Banjo v. Ayers, 614 F.3d 964, 967
 13 (9th Cir. 2010); Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005) (as amended);
 14 Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). For the reasons discussed
 15 below, it appears to the Court that Petitioner has not met his burden with respect to
 16 demonstrating any entitlement to statutory or equitable tolling.

17 The AEDPA provides for statutory tolling, as follows:

18 The time during which a properly filed application for State post-
 19 conviction or other collateral review with respect to the pertinent
 20 judgment or claim is pending shall not be counted toward any
 21 period of limitation under this subsection.

22 28 U.S.C. § 2244(d)(2). The United States Supreme Court has interpreted this
 23 language to mean that the AEDPA’s statute of limitations is tolled from the time the
 24 first state habeas petition is filed until the California Supreme Court rejects a
 25 petitioner’s final collateral challenge, so long as the petitioner has not unreasonably
 26 delayed during the gaps between sequential filings. Carey v. Saffold, 536 U.S. 214,
 27 219-21 (2002) (holding that, for purposes of statutory tolling, a California petitioner’s
 28 application for collateral review remains “pending” during the intervals between the
 time a lower state court denies the application and the time the petitioner files a further

1 petition in a higher state court).

2 Here, it appears from the face of the Petition that Petitioner did not file any
 3 collateral challenges. Thus, it does not appear to the Court that Petitioner is entitled
 4 to any statutory tolling of the limitation period.

5 In Holland v. Florida, 560 U.S. 631, 649 (2010), the Supreme Court held that
 6 the AEDPA's one-year limitation period also is subject to equitable tolling in
 7 appropriate cases. However, in order to be entitled to equitable tolling, the petitioner
 8 must show both that (1) he has been pursuing his rights diligently, and (2) some
 9 extraordinary circumstance stood in his way and prevented his timely filing. Holland,
 10 130 S. Ct. at 2562 (quoting Pace, 544 U.S. at 418). The Ninth Circuit has held that
 11 the Pace standard is consistent with the Ninth Circuit's "sparing application of the
 12 doctrine of equitable tolling." Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th
 13 Cir.), cert. denied, 130 S. Ct. 244 (2009). Thus, "[t]he petitioner must show that 'the
 14 extraordinary circumstances were the cause of his untimeliness and that the
 15 extraordinary circumstances made it impossible to file a petition on time.'" Porter,
 16 620 F.3d at 959 (quoting Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009)).
 17 "[T]he threshold necessary to trigger equitable tolling [under AEDPA] is very high,
 18 lest the exceptions swallow the rule." Miranda, 292 F.3d at 1066. Consequently, as
 19 the Ninth Circuit has recognized, equitable tolling will be justified in few cases.
 20 Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003); Waldron-Ramsey, 556 F.3d at
 21 1011 ("To apply the doctrine in 'extraordinary circumstances' necessarily suggests
 22 the doctrine's rarity, and the requirement that extraordinary circumstances 'stood in
 23 his way' suggests that an external force must cause the untimeliness, rather than, as
 24 we have said, merely 'oversight, miscalculation or negligence on [the petitioner's]
 25 part, all of which would preclude the application of equitable tolling.'").

26 Here, it does not appear from the face of the Petition that Petitioner has any
 27 basis for equitable tolling of the limitation period. The Court notes in this regard that
 28 neither the lack of legal sophistication, nor the lack of legal training, nor the lack of

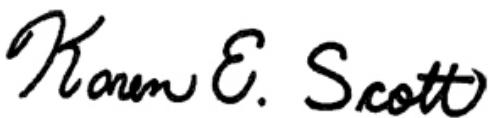
1 legal assistance, nor ignorance of the law, constitutes an “extraordinary circumstance”
2 entitling Petitioner to any equitable tolling of the limitation period. See, e.g., Rasberry
3 v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (holding that “a pro se petitioner’s lack
4 of legal sophistication is not, by itself, an extraordinary circumstance warranting
5 equitable tolling” of the AEDPA limitations period); Fisher v. Johnson, 174 F.3d 710,
6 714 (5th Cir. 1999) (ignorance of the limitation period did not warrant equitable
7 tolling).

8 Thus, the Petition constructively filed on or about October 29, 2015, is untimely
9 by approximately one year and ten months.

10 The Ninth Circuit has held that the district court has the authority to raise the
11 statute of limitations issue *sua sponte* when untimeliness is obvious on the face of the
12 petition and to summarily dismiss a petition on that ground pursuant to Rule 4 of the
13 Rules Governing Section 2254 Cases in the United States District Courts, so long as
14 the court “provides the petitioner with adequate notice and an opportunity to respond.”
15 See Nardi v. Stewart, 354 F.3d 1134, 1141 (9th Cir. 2004); Herbst v. Cook, 260 F.3d
16 1039, 1042-43 (9th Cir. 2001).

17 IT THEREFORE IS ORDERED that, on or before **December 30, 2015**,
18 Petitioner show cause in writing, if any he has, why the Court should not recommend
19 that this action be dismissed with prejudice on the ground of untimeliness.

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21 DATED: December 1, 2015

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25 KAREN E. SCOTT
26 UNITED STATES MAGISTRATE JUDGE
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